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Seventieth session (first part)

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Held at Headquarters, New York, on Wednesday, 2 May 2018, at 10 a.m.

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Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (A/CN.4/712 and A/CN.4/715)

The Chair invited the Commission to resume its consideration of the fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715).

Mr. Murase said that it was gratifying to see that the consideration of the topic on second reading was now coming to a close; he congratulated the Special Rapporteur on that successful result. Although he generally agreed with the content of the report, he thought that the formulation of guidelines rather than conclusions would be more appropriate for the topic, in line with what had been done under the topics of reservations to treaties and provisional application of treaties.

Referring to draft conclusion 4 (Definition of subsequent agreement and subsequent practice), he pointed out that the United States had been correct to assert that the reasoning of the Tribunal of the North American Free Trade Agreement in the case concerning *Canadian Cattlemen for Fair Trade v. United States* suggested that form of acceptance was what distinguished subsequent agreement from subsequent practice. However, he did not believe that the United States established the proper distinction when it stated that subsequent agreement required a common understanding regarding the interpretation of a treaty, of which the parties were aware and which they accepted, whereas subsequent practice did not. In his view, both subsequent agreement and subsequent practice required a common understanding. The distinguishing element was probably the notion of "agreement" itself, with subsequent practice that established an agreement being distinct from the "agreement" entered into in a subsequent agreement. He concurred with the Special Rapporteur's refutation of the remark by the United States that a distinction had been drawn in paragraph (20) of the commentary to the draft conclusion between practice for purposes of interpretation and practice for purposes of application. However, the Special Rapporteur's position in that regard should be set out more clearly in the commentary.

With regard to draft conclusion 5 (Attribution of subsequent practice), he said that he shared the concerns expressed by Mr. Hassouna and Mr. Murphy about the use of the term "attributable" in paragraph 1; the introduction of concepts pertaining to the responsibility of States for internationally wrongful acts seemed inappropriate. He endorsed the amendments to paragraphs 1 and 2 proposed by the United States and rejected the amendment suggested by the Special Rapporteur in paragraph 46 of his report, in which the important element of recognition was missing.

He had been among those who had expressed concerns about "evolutionary" or "evolutive" interpretation in connection with draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time). The Commission had been able to allay those concerns, but there still seemed to be room for improvement. The Special Rapporteur drew a distinction between the actual intention and the presumed intention of the parties, but some States had expressed concerns about that distinction. He agreed with Greece that attempts to identify the presumed intention of the parties could be misleading. He also agreed with El Salvador that whether a treaty was evolving or not depended not only on the presumed intention of the parties but also on other factors. The emphasis placed in draft conclusion 8 on the "presumed intention of the parties upon the conclusion of the treaty" seemed to prioritize the original intent of the parties and thus to subordinate other factors. The result was an abstract doctrinal choice between a contemporaneous and an evolutive approach to interpretation, which was precisely what the Commission had decided to avoid. Perhaps the draft conclusion could be amended to read: "Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether the meaning of a term used in a treaty is capable of evolving over time."

In paragraph 2 of draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), the word "it" should be replaced with "conduct", for the sake of clarity. While the word "consistency" was explained in the commentary, "breadth" was not, and it should be clarified. The Special Rapporteur seemed to consider that in order for subsequent conduct to be recognized under article 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties, the conduct of all States was not necessary. However, subsequent practice could not be established when the conduct of States was inconsistent. Draft conclusion 9, paragraph 2, should be amended to read: "The weight of subsequent practice under article 31 (3) (b) depends, in addition, on whether and how conduct is repeated and how many parties actively engage in subsequent practice."

Paragraph 1 of draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty) should be amended to read: "An agreement under

article 31, paragraph 3 (a) and (b), requires the awareness and acceptance of the parties." The second sentence of paragraph 2 was somewhat illogical: the question was not whether silence constituted acceptance of subsequent practice, but whether it could constitute subsequent practice. He therefore suggested the replacement of the word "acceptance" with "evidence".

He welcomed the proposed addition of the words "of the parties" in paragraph 2 of draft conclusion 12 [11] (Constituent instruments of international organizations), which helped to clarify the distinction between the practice of international organizations and the practice of States. However, the use of the word "practice" as opposed to "conduct" in both paragraphs 2 and 3 should be brought into line with the terminology of draft conclusions 4 and 5. Moreover, the use of those terms, and of "attribution", should be consistent with their usage in the draft conclusions on customary international law.

Unlike previous speakers on draft conclusion 13 [12] (Pronouncements of expert treaty bodies), he welcomed the inclusion of paragraph 4 and did not believe that it exceeded the scope of the topic, either in form or in substance. It was perfectly in line with the idea expressed by the Chair of the Human Rights Committee in his letter of 4 April 2017, cited in paragraph 123 of the Special Rapporteur's report, that clearer recognition should be given in the draft conclusions to the potential contribution of pronouncements of expert treaty bodies. That idea was corroborated by general comment No. 33 of the Human Rights Committee and by the substantive findings of the International Court of Justice in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. In addition, States strongly supported the work done by expert treaty bodies to interpret treaties and to ensure their application. As to form, paragraph 4 corresponded so closely to draft conclusion 12, paragraph 3, and to draft conclusion 11, paragraph 2, that if it were deleted, those two paragraphs would likewise have to be removed. As to substance, paragraph 4 did not imply that pronouncements of expert treaty bodies constituted subsequent practice. Rather, as indicated in paragraph 3, they "may give rise to, or refer to" a subsequent agreement or subsequent practice, and the Special Rapporteur elucidated that point in paragraph 131 of his report. The Chair of the Human Rights Committee had in fact recognized that the Committee's pronouncements did not directly constitute subsequent practice.

He endorsed the Special Rapporteur's proposal to submit the draft conclusions to the General Assembly in their current form.

Mr. Tladi said that if, as Mr. Murase had just suggested, the sole purpose of draft conclusion 13, paragraph 4, was to indicate that the pronouncements of expert bodies did not constitute subsequent practice, he saw no need why it was included. It seemed merely to repeat what was already stipulated in paragraph 3.

Mr. Murase said that the question should be taken up by the Drafting Committee, but in his opinion, the two paragraphs made an important point that benefited from being repeated.

Mr. Park, referring to the final form of the project as advocated by Mr. Murase, said that the Commission's practice had been evolving and now encompassed the use of guidelines, conclusions and principles, in addition to articles. He wondered whether in the Commission's 70-year history, there had been no definitions or guidance given concerning such terminology. If not, perhaps the Working Group on Methods of work should study the question.

Mr. Murphy said that he failed to see any provision in draft conclusion 11 that was comparable, as Mr. Murase suggested, to draft conclusion 13, paragraph 4.

Mr. Murase said that the Commission was a normative body; it was not engaging in a purely academic exercise. Hence, the format of its output on the current topic should conform to that used for other texts relating to the law of treaties, namely reservations to treaties and provisional application of treaties. As to Mr. Murphy's question, he said that the idea advanced in draft conclusion 13, paragraph 4, was implicit in draft conclusion 11, paragraph 2, and draft conclusion 12, paragraph 3, although admittedly they were not directly comparable.

The Chair said that the practice as to the final form of the Commission's output had evolved, as Mr. Park had pointed out, and the Commission now had a range of possibilities to choose from. It was for the Drafting Committee to deal with the points just raised; following a preliminary discussion, it should make a recommendation to the plenary, without prejudice to the holding of a broader debate, in the Working Group on Methods of work, on the question of final form in general.

Ms. Oral congratulated the Special Rapporteur for his meticulous and informative work on subsequent agreements and subsequent practice in relation to the interpretation of treaties and said that the few comments she was making were intended to facilitate the completion of work on that important topic.

Referring to paragraph 5 of draft conclusion 2 [1] (General rule and means of treaty interpretation), she said that there was an interesting discussion in paragraph 26 of the Special Rapporteur's report on whether to include a reference to the nature of the treaty. While she agreed that the nature of the treaty could be a relevant factor in its interpretation, it was also closely linked to the object and purpose of a treaty, a point made during the discussions in the Drafting Committee. She therefore agreed with the Commission's decision not to include a specific reference to the nature of the treaty.

In connection with draft conclusion 4, she said that the elements that differentiated a subsequent agreement under article 31 (3) (a) from subsequent practice under article 31 (3) (b) were not clear, as amply discussed by the Special Rapporteur in paragraphs 69 to 75 of his first report (A/CN.4/660). However, a clear explanation as to the distinction between the two means of interpretation was provided in paragraph (10) of the commentary to the draft conclusion. Under article 31 (3) (a), an agreement — whether binding or not — that reflected the common understanding of all the parties expressed in a single common act was required. While subsequent practice consisted of disparate acts or conduct of the parties, it must still express or reflect the common understanding of all the parties. She was inclined to agree with the comment of the United Kingdom and Mr. Park that the word "all" should be inserted in paragraph 2, to make clear that the agreement of all the parties was required. The word "all" should also be inserted in paragraph 1, for the sake of clarity, even though an explanation was provided in the commentary.

In his introductory statement on his report, the Special Rapporteur had recognized that draft conclusion 5 was one of the few for which substantive considerations spoke in favour of changing its formulation. She welcomed the reformulated text proposed by the Special Rapporteur for the first paragraph of the draft conclusion. However, certain States had indicated their reservations on employing the terminology of attribution from the law of State responsibility. Mr. Murphy had suggested that the text should be revised in line with the text on identification of customary international law: that proposal should be considered by the Drafting Committee. In her initial reading of both paragraphs of the draft conclusion, she had been inclined to agree with the suggestion made by some States to exclude the second paragraph. However, the commentary made quite clear the basis and justification for the paragraph and so she supported its retention.

She agreed with the Special Rapporteur overall on draft conclusion 6, including with his recommendation to remove the word "normally" and replace it with "always" in the first sentence of paragraph 1, and to adopt the proposal by Ireland to insert the words "for example" in the second sentence of that paragraph. While she saw the logic in the proposal by the United Kingdom to make paragraph 2 the new paragraph 1, she nonetheless supported the wish of the Special Rapporteur to keep the sequence of the paragraphs unchanged. She endorsed paragraph 3.

On draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), she agreed with the Special Rapporteur that it did not seek to resolve the divergence of views concerning the role of subsequent agreements and subsequent practice under article 31 in modifying or amending a treaty, but only to provide general guidance. The commentary made that point amply clear, and paragraphs 1 and 2 were likewise quite clear. However, with regard to paragraph 3, which had drawn the most comments from States, she was inclined to agree with Mr. Murphy that the reference to a presumption in favour of interpretation over modification might not be appropriate. While one option, as Mr. Murphy had suggested, was to delete paragraph 3, another option was simply to delete the first sentence, so that paragraph 3 would read: "The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties."

As currently written, draft conclusion 8 could be read as restricting an evolutive interpretation by requiring the preliminary step of determining that the parties had contemplated such an evolutive interpretation. However, as explained by the Special Rapporteur and as clearly reflected in the commentary, that did not seem to be the intent behind the draft conclusion. The examples provided were varied and included cases where it was not evident that any predetermination of the intent of the parties had been established. In paragraph (10) of the commentary, it was explained that draft conclusion 8 did not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general, but took a cautious approach towards determining whether the evolutive approach applied in specific cases. She therefore agreed with the wish of the Special Rapporteur to maintain the current version of the draft conclusion, but she also agreed with Mr. Murphy's proposal to delete the word "presume" before "intent".

She supported the modifications to draft conclusion 9 proposed by the Special Rapporteur, based on the proposals of States to insert the words "its consistency, breadth, and" in paragraph 2. She agreed with Mr. Tladi's explanation of the use of "breadth" and thought that such additional explanations would add clarity to the text.

She agreed in general with draft conclusion 10 and appreciated the comment by Mr. Hassouna that paragraph 1 could be drafted more clearly and the recommendation by Mr. Tladi to consider the suggestion by Ireland. Those were ideas for the Drafting Committee to consider. Mr. Murphy had raised an interesting point: that for the purposes of subsequent practice, the parties should share the same understanding, not a common one. While it was underlined in the commentary that the requirement of a common understanding of the parties meant all the parties, it was also indicated in paragraph (4) that agreement was only absent to the extent that the positions of the parties conflicted and for as long as their positions conflicted. That temporal aspect was not reflected in draft conclusion 10 and it would have added greater clarity. The Drafting Committee should consider whether such an additional qualification might be included.

On draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties), she shared the views expressed by El Salvador and the Republic of Korea on the important role of conferences of States parties for treaty interpretation. In general, she agreed with the draft conclusion, but she also agreed that the addition of the word "consensus" could lead to confusion: she would recommend its deletion.

With regard to draft conclusion 12 [11] (Constituent instruments of international organizations), she supported the revisions made by the Special Rapporteur in response to the comments by several States on the need to make clear what was the practice of States and what was that of international organizations by inserting the words "of the parties" after "subsequent practice" throughout paragraph 2. She also agreed with the approach outlined by the Special Rapporteur in paragraph 117 of his report on how to distinguish between the subsequent practice and agreements of States, on the one hand, and the subsequent practice of an international organization, on the other, namely by following the proposal of the Republic of Korea to add explanations in the commentary.

In conclusion, she thanked the Special Rapporteur for his report and believed that the Commission should bring it to the attention of the General Assembly.

Mr. Grossman Guiloff thanked the Special Rapporteur for his careful and extensive preparation of the draft conclusions and for his thoughtful responses to the concerns and questions raised in the Sixth Committee and by members of the Commission. He generally supported the Special Rapporteur's vision for the final form of the draft conclusions and hoped that the General Assembly would take note of them and the relevant commentary in a resolution.

On the whole, the draft conclusions reflected the significance of subsequent practice and subsequent agreements by States parties in interpreting treaties, as well as the increasing role that non-State actors played in the development of subsequent practice and subsequent agreements or the realization of the object and purpose of treaties on the interpretation of treaties. He supported the inclusion of draft conclusions relating to subsequent practice and subsequent agreements of international organizations, decisions made within the framework of conferences of States parties, and pronouncements by expert treaty bodies. He also believed that whether the decisions of adjudicatory bodies, including domestic courts, should be addressed in a draft conclusion should be further discussed.

He endorsed draft conclusion 1 [1a] (Introduction) and agreed with the Special Rapporteur that it should not be overly complicated. He agreed with the substance of draft conclusion 2, which promoted consistency with article 31 of the 1969 Vienna Convention. However, he believed the structure of the draft conclusion could be improved by moving paragraph 5 up so that it became the new paragraph 2. As the United Kingdom had noted, the substance of paragraph 5, namely that the interpretation of a treaty consisted of a single combined operation, was crucially important to the exercise of treaty interpretation. Therefore, placing the paragraph earlier in the draft conclusion would better reflect the nature of treaty interpretation. He also agreed with the United Kingdom that the commentary to the draft conclusion should be revised to more clearly reflect the fact that the rules on interpretation applied, as a matter of customary international law, to treaties which predated the Vienna Convention. No changes should be made to draft conclusion 3, except for replacing, in the Spanish version, the words "*en el sentido*" with "*en virtud del*".

Although the substance of draft conclusion 4 was fully acceptable, paragraph 1 might be further clarified. As Austria and the United Kingdom had pointed out, a subsequent agreement did not need to be legally binding to be useful in interpreting a treaty. That point was made in the second sentence of draft conclusion 10, paragraph 1, but placing it earlier in the whole text

would help to clarify what could be considered a subsequent agreement. Perhaps, then, the relevant part of draft conclusion 10 should be included in paragraph 1 of draft conclusion 4. The Special Rapporteur had expressed concern that that would overburden draft conclusion 4, but that provision was critical to understanding the scope of the definition of subsequent agreements and should be placed earlier in the draft conclusions.

On draft conclusion 5, which he generally supported, he shared with the United States the concern that, paragraph 1, as currently written, might be misleading. Its clarity could be improved by indicating that State practice represented a course of conduct rather than a solitary action. The point was fairly complex, but it could be explained in the commentary. It could also be made clear that actions taken in interpretation of a treaty by lower-ranking officials, when attributable to the State, could only amount to subsequent practice if they were consistent and acknowledged and endorsed by the State. He agreed with the Special Rapporteur that paragraph 2 was generally clear. It reflected the fact that practice by non-State actors normally did not directly impact on the interpretation of treaties. However, it also reflected the fact that non-State actors played an increasing role in international affairs, and that actions taken by States towards non-State actors in the application of treaties constituted State practice and contributed to the interpretation of treaties. Additionally, in response to the comment by Germany regarding non-State actors acting on behalf of a State in implementing a treaty, he agreed that such conduct could constitute subsequent practice if the non-State actors were acting as agents of the State.

On draft conclusion 6, he agreed with the revisions suggested by the Special Rapporteur and Ireland to paragraph 1. They allowed for the necessary flexibility in identifying subsequent State practice and subsequent agreements by signalling that the sort of situation mentioned was just one exception and made the paragraph more consistent with paragraph 2, which reiterated that subsequent agreements and subsequent practice could take a variety of forms.

He agreed with the Special Rapporteur that paragraph 1 of draft conclusion 7 was clear and appropriate and that the approach of the Commission had been generally accepted. While the Special Rapporteur recommended leaving the draft conclusion as it was, he himself saw a need to discuss whether paragraphs 2 and 3 should be revised to promote consistency with the 1969 Vienna Convention and with current State practice and *opinio juris* concerning the interpretation of treaties. He agreed with Spain that the word "clarification" in paragraph 2 should be replaced with "confirmation", because article 32 of the Vienna Convention used the word "confirmation" when describing the function of subsequent practice. He also agreed with the proposal by the United Kingdom to add the words "by confirming the interpretation that has been reached under conclusion 7 (1)" at the end of the paragraph. That addition more accurately reflected the relationship between interpretation of a treaty under article 31 and confirmation of such interpretation under article 32. Moreover, it was consistent with the proposed revisions to draft conclusion 9, paragraph 3.

There was also a need to consider whether draft conclusion 7, paragraph 3, should be revised. The first and second sentences, which discussed the amendment and modification of treaties, should be deleted, in line with the comments made by Romania and Italy. The change would have the text more accurately address the divergence of views within the Commission, the Sixth Committee and the larger international community regarding what role, if any, subsequent practice and subsequent agreements played in the amendment and modification of treaties. As Austria had noted, consistent State practice in interpreting a treaty, if accompanied by *opinio juris*, could become customary law. Subsequent practice of that magnitude would undoubtedly be relevant to the interpretation of the treaty and could also lead to the amendment or modification of the treaty, depending on the terms of the treaty. Furthermore, as noted by the Netherlands, the extent to which subsequent practice and subsequent agreements could amend or modify a treaty depended on the treaty itself. Finally, as suggested by the Special Rapporteur, the last sentence in paragraph 3 should be moved to form a separate paragraph. That would further separate the issue dealt with in the draft conclusions from the evolving issue, which was not the subject of the draft conclusions, of subsequent practice and subsequent agreements in relation to the amendment and modification of treaties.

He agreed with the Special Rapporteur on the substance of draft conclusion 8. The words "may assist" provided the necessary flexibility for evaluating whether subsequent practice and subsequent agreements were relevant to the interpretation of a term in a treaty. However, he also agreed with the United States that the inclusion of the words "presumed intention" could be misleading. The reference to intention could be removed, to preclude reading the draft conclusion as authorizing an investigation into the intent or presumed intent of the parties upon conclusion of the treaty. While the Special Rapporteur had noted that the provision was clarified in the commentary, it would be clearer yet if

any reference to intention was left out of the draft conclusion.

While endorsing the content of draft conclusion 9, he suggested that the criteria for evaluating the weight given to subsequent practice and subsequent agreements when interpreting treaties, as listed in paragraph 1, could be elaborated further. As the United Kingdom and El Salvador had suggested, such criteria should be expanded to include consistency, breadth, timing and the emphasis of the parties. While he agreed with the Special Rapporteur that the criteria suggested by El Salvador, namely timing and emphasis of the parties, might not always be applicable to determining the relevance of subsequent practice or subsequent agreements in treaty interpretation and might be difficult to measure, he believed the problem could be addressed by adding the words "when relevant" to paragraph 1. Paragraph 3 could be revised to be more consistent with the Vienna Convention by replacing the words "supplementary means of interpretation" with "confirmation of the interpretation under article 31," and moving that phrase to appear after the words "under article 32". That revision would more clearly reflect the relationship between articles 31 and 32 of the Vienna Convention.

On draft conclusion 10, the substance of which he endorsed, he suggested that consideration should be given to revising paragraph 1. He supported the distinction drawn by the Special Rapporteur between subsequent agreement and subsequent practice. As acknowledged in paragraph 1, a subsequent agreement required a common understanding regarding the interpretation of a treaty which the parties were aware of and accepted. In contrast, acceptance of subsequent practice establishing an agreement on interpretation could be inferred from silence when, as indicated in paragraph 2, "the circumstances call for some reaction." Contrary to what the Czech Republic had said, the draft conclusion made it clear that silence could only be seen as acceptance if some reaction in opposition would be warranted. Accordingly, if a party did not participate in a practice when presented with the opportunity to do so, such conduct would signify disagreement by action, rather than agreement by silence. He advocated moving the last sentence of paragraph 1, dealing with the relevance of legally binding versus non-legally binding agreements on treaty interpretation, to draft conclusion 4.

He agreed with the Special Rapporteur that no changes to the current text of draft conclusion 11 were necessary. Speakers in the Sixth Committee had supported the recognition in the draft conclusion of the relevance of decisions made within the framework of a conference of States parties to the interpretation of treaties. As noted by the Netherlands and the United States, the relevance of such decisions varied, depending on the terms of the treaty in question. Additionally, when a decision was reached as to the interpretation of a treaty, it could be considered subsequent practice or subsequent agreement under article 31, and its probative value in interpreting the treaty could be significant. As currently written, the draft conclusion conveyed the potential significance to the interpretation of a treaty of a decision made within the framework of a conference of State parties as well as the importance of evaluating the significance of such decisions against the terms of the specific treaty.

Concerning draft conclusion 12, some States had voiced concern that it did not sufficiently distinguish between the subsequent practice and subsequent agreements of States and those of international organizations in treaty interpretation. He agreed that the distinction was important and supported the Special Rapporteur's suggested revisions to paragraph 2, apparently based on comments by Romania and Spain. On the other hand, he disagreed with the suggestion by some States that a reference to treaty modification or amendment should be included. Such a reference would be inappropriate, because such matters fell outside the scope of the draft conclusions.

He recalled that the subject matter of draft conclusion 13, namely pronouncements of expert treaty bodies, had been debated extensively not only at the International Court of Justice, but also within the Commission and other authoritative bodies. For instance, the Court had indicated, in the *Diallo* case, that it (the Court) should "ascribe great weight to the interpretation adopted by this independent body" (the Human Rights Committee) "that was established specifically to supervise the application of that treaty", namely the International Covenant on Civil and Political Rights. No valid argument had been presented so far to narrow the scope of that decision and its value for the Special Rapporteur's task.

Extensive materials drawn from the work of treaty bodies, such as their views, general comments and concluding observations, were also often cited by States, as evidenced, for example, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice. In its memorial, Belgium had argued that the object and purpose of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were clearly established in its preamble: the Convention had been adopted to "make more effective the struggle against torture and other

cruel, inhuman or degrading treatment or punishment." Senegal, in its counter-memorial in reaction to its obligations under article 22 of the Convention, had stated that it was bound "on the one hand to act on the recommendations of the Committee against Torture and, on the other, to execute the mandate that it had received from the African Union" to bring to trial the former President of Chad, Mr. Hissène Habré. The Assembly of African Heads of State and Government, at its seventeenth session held in July 2011, had urged Senegal to carry out its legal responsibility in accordance with the Convention against Torture and the decision of the Committee and to put Mr. Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial.

In a letter of 4 April 2017 addressed to the then-Chair of the Commission, the Chair of the Human Rights Committee had pointed out that the national courts of States parties quoted pronouncements of the Committee in their judgments. In its comments contained in document A/CN.4/712, Sweden, on behalf of the Nordic countries, had stated that expert treaty bodies contributed to the understanding, implementation and development of international human rights law through their pronouncements, general comments, decisions and recommendations.

Treaty bodies were established by States to realize the object and purpose of their constituent instrument. States were free to accept the different forms of supervision under those treaties, including the right of individuals to present petitions claiming that a violation had occurred. In his opinion, the proposal by the Special Rapporteur was modest, since it used the verb "may," yet it embodied important practice and principles with legal relevance. That flexibility was needed in an area whose significance for States and individuals could not be overstated, in order to capture the complexity of the current state of play, where State practice accorded legal value to some of the outputs of treaty bodies and some States considered that they had an agency relationship with treaty bodies, while others distinguished between the procedural aspects and the substantive decisions of those bodies and set up monitoring mechanisms in which they themselves, as a group, served as collective guarantor of compliance.

In general, States created treaty bodies as a means of channelling, through legal structures, their aspirations and demands relating to, for example, due process, non-discrimination and the rights of children and women; and of giving relevance to the rule of law rather than to encouraging extralegal action and extremism. That was the political context in which the Commission was called upon to work, and it must tread very carefully. The flexibility shown by the Special Rapporteur was therefore commendable.

In conclusion, he said that he supported the ultimate aim of the draft conclusions.

Mr. Rajput wished to know what, for the purposes of subsequent practice, would be an appropriate distinction between a fact-based analysis of the pronouncement of treaty bodies particular to a certain case and a general observation on State practice.

Mr. Tladi said that he had resisted the inclusion of a reference to the pronouncements of treaty bodies because he was not convinced that they constituted subsequent practice in treaty interpretation. They were certainly valuable and had legal effect. But the real question was whether they were valuable because they elucidated something about the object and purpose of a treaty or because they came from an authoritative body that had interpreted the treaty.

Mr. Grossman Guiloff said he was aware that at issue was not the intrinsic value of pronouncements of treaty bodies, but their relevance to subsequent agreements and subsequent practice in relation to treaty interpretation. When States created a treaty monitoring body on compliance with a clause on non-refoulement, for example, they did not clarify the conditions to be fulfilled regarding such compliance. Subsequently, a treaty body might make a finding about the conditions under which the principle of non-refoulement might be applicable, or not applicable. That finding might be reinforced by other treaty bodies and might ultimately influence State practice. Hundreds of such interpretations had been issued over the years by the treaty bodies, arising both from individual cases and from general observations. As to how pronouncements on specific cases compared with general comments, he pointed out that, in the *Belgium v. Senegal* case, it was a general comment of a treaty body that had been cited. In pronouncements on individual cases, specific norms would be applied, and the cumulative effect of their application might give rise to a rule or to an interpretation of a clause in a convention.

Mr. Hmoud said that the nature of pronouncements of treaty bodies had already been discussed extensively and the Commission's position was clearly laid down in paragraph 3 of draft conclusion 13. As Mr. Tladi had pointed out, the issue was not the value of such pronouncements, but whether they truly constituted subsequent practice in relation to the interpretation of treaties. The Commission had already decided that they did not.

The meeting was suspended at 11.35 a.m. and resumed at 12 noon.

Mr. Saboia said that he wished to congratulate the Special Rapporteur for his excellent report, which helped to increase understanding and shed light on the operation of important provisions of the 1969 Vienna Convention, thus adding a new chapter to the already substantial body of work on the law of treaties developed by the Commission over its 70 years of existence.

The 13 draft conclusions and commentaries thereto that the Commission had adopted on first reading at its sixty-eighth session had been well received by States, judging both by their comments expressed in the Sixth Committee and those submitted in writing in accordance with established practice.

As the Commission neared the conclusion of its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties, it was worth looking back at the history of the topic and briefly revisiting the broad perspective from which it had been approached during the debate concerning its inclusion in the Commission's programme of work. The topic had originally been entitled "Treaties over time" and entrusted to a Study Group ably chaired by Mr. Nolte. The rules on subsequent agreements and subsequent practice, as contained in article 31 (3) (a) and (b) of the 1969 Vienna Convention, had been considered not only as part of the general rule of treaty interpretation but also as among the intertemporal elements that affected treaty law, including the question of whether treaties must be subject to contemporaneous or evolutive interpretation.

The Study Group on Treaties over time had worked from 2008 to 2012 and had examined a large number of materials and case law on the issue of subsequent agreements and subsequent practice, as presented in the three reports of its Chair. Although aware from the start of the need to avoid an overly broad approach to the subject of the effects of time on treaty interpretation, the Study Group had found that the complexity of the issue called for narrowing the scope of the topic. The change in its title from "Treaties over time" to its current title, particularly through the addition of the words "in relation to the interpretation of treaties", reflected a decision to adopt a more focused approach, while the appointment of Mr. Nolte as Special Rapporteur for the topic ensured continuity with the work already completed by the Study Group.

In the introduction to his first report on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/660), the Special Rapporteur had included a quotation from the original proposal for the topic that nevertheless remained relevant in the current context:

> As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being "frozen" into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.

That was the perspective from which the topic had originally been perceived, and one that remained valid, even though its scope had had to be narrowed and its visionary tone subdued. As on previous occasions when the Commission had attempted to deal with a temporal issue, the complexity surrounding it appeared too difficult to overcome, both for States and for the Commission. Accordingly, as explained in paragraph (2) of the commentary to draft conclusion 1: "The draft conclusions do not address all conceivable circumstances in which subsequent agreements and subsequent practice may play a role in the interpretation of treaties." Among examples of circumstances not covered by the topic were treaties between States and international organizations, treaties between international organizations and rules adopted by an international organization. Thus, even as the Commission was concluding its efforts on the topic, it appeared that additional work remained to be done in relation to that aspect of the law of treaties.

Concerning the text of the draft conclusions, he had no issue with draft conclusions 1 to 4. With regard to draft conclusion 5, he considered acceptable the Special Rapporteur's recommendation, set out in paragraph 46 of his report, that paragraph 1 should be reformulated to make it clearer that not every conduct that could be attributed to a State under the rules of State responsibility was sufficient to count as subsequent practice for the purpose of treaty interpretation. He was

also open to the suggestions for improving the text that had been made by Mr. Murphy and Mr. Murase.

With reference to paragraph 3 of draft conclusion 7, he appreciated the Special Rapporteur's concise and substantive description in his report of the divergent views on the general question of whether the subsequent practice of the parties could lead to the modification of a treaty. He shared the Special Rapporteur's opinion that the wording of paragraph 3 reflected the widest possible agreement among States and members of the Commission and should be retained.

With regard to draft conclusion 9, he considered the Special Rapporteur's proposal for the reformulation of paragraph 2, as set out in paragraph 84 of his report, to be a good improvement to the text.

As to draft conclusion 10, responding to a contrary view expressed by the United States of America concerning the first sentence of paragraph 1, the Special Rapporteur had rightly pointed out in paragraph 87 of his report that the *travaux préparatoires* relating to article 31 (3) (a) and (b) of the 1969 Vienna Convention showed that awareness and acceptance of the parties were considered necessary for the interpretation of a treaty.

With regard to draft conclusion 11, the United Kingdom and Ireland had made a proposal to move to the commentary the reference to consensus contained in paragraph 3. He agreed with the Special Rapporteur's response to that proposal in paragraph 102 of his report that the concern expressed by those States did not justify shifting the most important category in practice from the text of the draft conclusion to the commentary. He himself preferred to keep paragraph 3 as it stood; however, as an alternative, he would not be opposed to enclosing in brackets the words "including by consensus", as proposed by the Special Rapporteur in that same paragraph.

With regard to draft conclusion 12, several States had expressed concern that an insufficient distinction had been drawn between, on the one hand, the subsequent agreements and subsequent practice of States parties, addressed in paragraph 2, and, on the other, the subsequent agreements and subsequent practice of international organizations as such, addressed in paragraph 3. He considered their concern to be unfounded in that it was based on an approach aimed at minimizing the legal status of international organizations, which, as the International Court of Justice had pointed out in its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, were "endowed with a certain autonomy". The text adopted on first reading seemed perfectly acceptable to him. Nevertheless, he could endorse the Special Rapporteur's proposal in paragraph 119 of his report that the words "of the parties" should be inserted after the words "subsequent practice" in the two instances in which they appeared in paragraph 2. He furthermore endorsed the Special Rapporteur's argument in paragraph 111 of his report against the deletion from paragraph 3 of the reference to article 31 (1) of the 1969 Vienna Convention.

The formulation of draft conclusion 13 was a good illustration of the balance that could be struck on a subject that had elicited a wide divergence of views. At the same time, he would have preferred for it to describe more fully the role currently played by expert bodies. It was regrettable that the narrow scope of the provision did not cover those expert bodies that were organs of an organization, irrespective of their level of independence. The Special Rapporteur had carefully analysed the comments of States, had retained most of what the Commission had adopted on first reading and had made two significant recommendations, both of which he fully endorsed. The first was aimed at providing more clarity to the part of the provision that dealt with the effects of silence. The second was a proposal to return to an earlier formulation contained in his fourth report (A/CN.4/694) and to add the new paragraph set out in paragraph 139 of his report. He fully concurred with that proposal and supported the comments of Mr. Murase and Mr. Grossman Guiloff along those lines. The addition of that new paragraph at the end of the project would constitute a significant improvement to the entire set of draft conclusions.

Mr. Nguyen said that the report of the Special Rapporteur was excellent and constituted a comprehensive and thoughtful piece of work which logically reaffirmed the final set of proposed draft conclusions. Although he agreed with most of the draft conclusions and commentaries, there were a few specific points he wished to raise in an effort to improve the text.

In paragraph 1 of draft conclusion 2, it would be useful to insert the words "of 1969" after the words "the Vienna Convention on the Law of Treaties", in order to avoid any confusion with the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

In paragraph 2 of draft conclusion 5, the inclusion of the words "Other conduct, including by non-State actors" seemed to emphasize the conduct of such actors and could lead readers to believe that it was one of the main categories of conduct that did not constitute subsequent practice under articles 31 and 32. Such

conduct could nevertheless be relevant when assessing the subsequent practice of parties to a treaty, and there were possibly other forms of conduct by actors other than non-State actors that were covered by the terms of that paragraph. Logically, that would mean that some forms of conduct by non-State actors were covered under paragraph 2, thus making it overlap with the scope of paragraph 1. To ensure consistency with paragraph 3 of draft conclusion 4 and with paragraph 3 of draft conclusion 6, the phrase "one or more" should be inserted before the word "parties" in paragraph 2 of draft conclusion 5. For the sake of clarity, he proposed that paragraph 2 should be amended to read: "Conduct other than that covered by paragraph 1 does not constitute subsequent practice under articles 31 and 32. Said conduct may, however, be relevant when assessing the subsequent practice of one or more parties to a treaty."

Draft conclusion 6 was clear. A written agreement, an informal agreement or a non-binding arrangement arrived at subsequent to the conclusion of a treaty could have the value of a subsequent agreement in the interpretation of the treaty. There was no hierarchy among the various forms of subsequent agreement and subsequent practice in the interpretation of treaties. That observation was consistent with paragraph 1 of draft conclusion 9. However, with regard to the Special Rapporteur's suggestion in paragraph 60 of his report to replace the word "normally" in the second sentence of paragraph 1 with the word "always", he shared the concern that had been raised by Mr. Park and Mr. Murphy.

With regard to draft conclusion 7, the words "can also" in paragraph 2 failed to convey adequately the secondary role and indirect possible effect of subsequent practice under article 32 of the 1969 Vienna Convention relative to that of subsequent agreements and subsequent practice under article 31 (b) of the Convention to which reference was made in paragraph 1. In paragraph 2, he proposed that the word "can" should be deleted and that the word "also" should be moved and inserted after the word "contribute".

Noting the concern raised by Spain with regard to the use of the word "clarification" in paragraphs 1 and 2 and the fact that article 32 of the 1969 Vienna Convention used the verbs "confirm" and "determine" but not "clarify", he proposed that the word "identification" should be used in place of the word "clarification" in both paragraphs. In paragraph 3, replacing the phrase "[i]t is presumed that" with the phrase "[f]or the purpose of the present draft conclusion" would help to avoid confusion.

With regard to draft conclusion 10, he agreed with the Special Rapporteur that the formulation of paragraph 2 was firmly rooted in the long-established terminology of the Commission and of the International Court of Justice. However, in the context of subsequent practice in relation to the interpretation of treaties the International Court of Justice and other judicial bodies did not use the word "silence" in all their decisions, with expressions such as "omission", "acquiescence", "tacit acceptance", "tacit consent" and "tacit agreement" being used to refer to the same concept. However, "tacit consent" and other similar expressions could imply that, the party concerned had been aware of and had accepted the subsequent practice of the other party. It could also be understood without being openly expressed. Since not all types of silence could be explained as acceptance of a common understanding regarding subsequent practice, a more comprehensive approach would be to include the concepts of both silence and intended omission.

In addition, the word "silence" had a different meaning in draft conclusion 10 than it did in draft conclusion 13. In paragraph 2 of draft conclusion 10, silence on the part of one or more parties could be presumed to constitute tacit acceptance of the subsequent practice as an authentic means of interpretation under article 31 (3) (a) when the circumstances called for some reaction, whereas paragraph 3 of draft conclusion 13 concerned the silence of a party in the case of a pronouncement of an expert treaty body in the interpretation of a treaty, which was a supplementary means of interpretation and did not require a response. The reason for choosing the word "silence" in various situations should therefore be further clarified in the commentary.

In draft conclusion 13, it should be explicitly indicated in paragraph 4 that the pronouncement of an expert treaty body was not legally binding. Such a pronouncement could not modify or amend the provisions of a treaty, and, as mentioned previously, States had no obligation to provide a response to it.

In conclusion, he wished to pay tribute to the Special Rapporteur, whose expertise, guidance and cooperation had greatly facilitated the Commission's work on the topic. Completion of the second reading of the set of draft conclusions would make a major contribution to the elucidation of the 1969 Vienna Convention on the Law of Treaties and to treaty law in general. It would highlight the important role of subsequent agreements and subsequent practice in the contemporaneous and evolutive approaches to the interpretation and application of treaties and reflect the progressive development of the rules for the

interpretation of international treaties on the basis of article 31 (3) (a) and (b) and article 32 of the Convention. He was therefore in favour of referring the draft conclusions to the Drafting Committee and endorsed the Special Rapporteur's proposal to recommend to the General Assembly that it should take note of the draft conclusions in a resolution.

The meeting rose at 12.40 p.m. to enable the Drafting Committee on Peremptory norms of general international law (jus cogens) to meet.